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IN THE

Supreme Court of the United States

OCEANIC EXPLORATION COMPANY,
A DELAWARE CORPORATION; ET AL., PETITIONERS

v.

PHILLIPS PETROLEUM COMPANY ZOC,
A DELAWARE CORPORATION ET AL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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I. INTRODUCTION.

Oceanic's petition for certiorari described district court proceedings that dramatically affronted virtually every law, rule, or case relevant to an entry of judgment on the pleadings. In those proceedings, the district court trampled on two opinions and three years of work by another federal district judge, most if not all of the Federal Rules of Civil Procedure intended to govern the pleading of claims in federal court, and most if not all of the rules intended to preclude the summary adjudication of fact issues at the pleadings stage – all in order to issue a completely improper Rule 12(c) judgment on the hotly-contested pleadings in this case.

The Fifth Circuit nevertheless blessed that judgment on the authority of this Court's *Twombly* and *Iqbal* decisions,[1] and did so on the basis of its conclusion, reached *at the pleadings stage*, as to which of the possible Australian government foreign policy responses to Oceanic's potential replacement of ConocoPhillips in the Timor Gap it believed to be "plausible."[2] That conclusion was in turn based on demonstrably false factual conclusions[3] improperly

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[1] *Bell Atlantic Corp v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v Iqbal*, U.S. 129 S. Ct. 1937 (2009).

[2] *See* Pet. App. at 13a ("Assuming, absent bribery, that East Timor was willing to consider replacing ConocoPhillips with Oceanic, the Complaint presents no reason to believe that Australia would allow this to happen."). The Fifth Circuit did not endorse the remainder of the district court's dismissal opinion. *Id* at 16a n.12.

[3] In its Petition, Oceanic pointed to the complete falsity of all of the key findings and assumptions on which the Fifth Circuit's

drawn from unknown sources, of unknown quality, outside the pleadings, and outside the court record.

Oceanic asks this Court to grant the writ of certiorari, and reverse the Court of Appeals, because the courts below decided questions of federal law in a manner that conflicts with that law and with the relevant decisions of this Court; because it decided, incorrectly, questions of federal law that have not but should be decided by this Court; and because the Court of Appeals, by virtue of its decisions, allowed the District Court to depart radically from the accepted and usual course of proceedings in the courts of this land.[4]

These deficiencies were set forth in great detail in Oceanic's petition, but are largely ignored by ConocoPhillips. Instead of discussing the *Twombly/Iqbal* issues that underpin the Court of Appeals' ruling, ConocoPhillips argues, very incorrectly, that (1) the permissible scope of the *Twombly/Iqbal* plausibility analysis is not at issue; and (2) that this case turned on RICO law, not on an adjudication of the facts. As will be seen below, however, that incorrect analysis only gives rise to one more ground for granting the writ.

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ruling was predicated. *See* Pet. at 12 n. 23; *id* at 21-24. As ConocoPhillips cannot and does not defend the accuracy of those findings, it can only quibble that: (1) Oceanic used the present tense in a 2005 complaint (written when Bayu-Undan was *finally* producing natural gas liquids); and (2) the presence of reserves long antedating ConocoPhillips' presence in the Timor Gap somehow proved that ConocoPhillips was producing in the field when it was not. *See* Response at 14-15.

[4] *See* Supreme Court Rule 10(c) and 10(a), respectively.

II. PETITIONERS' POINTS IN REPLY.

Oceanic is a serious plaintiff bringing serious claims,[5] and the ways in which it was deprived of those claims in the courts below raise issues that merit this Court's full and close attention. The first section below concerns those issues that arise from the errant RICO analysis that ConocoPhillips offers in lieu of a response to Oceanic's *Twombly/Iqbal* arguments. In light of the Response, the second section offers one last observation on those *Twombly/Iqbal* issues.

A. OCEANIC HAS PLEADED THE PROXIMATE CAUSE ELEMENTS OF ITS RICO, ANTITRUST AND COMMON LAW CLAIMS IN ACCORDANCE WITH FEDERAL LAW AND THIS COURT'S JURISPRUDENCE.

Much of the Response complains that Oceanic pays inadequate attention to this Court's opinions

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[5] In its Response (at 11, n.5), ConocoPhillips describes Oceanic as a small San Diego company having no business developing an oil and gas field in the Timor Gap. In actuality, however, Oceanic is a project vehicle with decades of extensive international energy development experience. *See, e g*, Pet. App. at 110a (¶ 51). Additionally, Oceanic was and is only one of a huge, well-funded and family-controlled group of companies that operate, on a world-wide basis, in the nuclear and non-nuclear energy sectors, as well as in numerous other advanced technology and industrial sectors. Defendants know this, as did the courts below. *See* DE No. 153 at 46-48 (transcript of the April 5, 2007 status conference); DE Nos. 149-151 (partial Oceanic corporate organization chart filed under seal). This Court should also know it.

[7] Response at 4-9.

regarding the pleading of proximate cause in the RICO/antitrust context.[7] However, the Fifth Circuit did not base its decision on those opinions. It based its decision on the alleged implausibility of what was pleaded.

Nevertheless, to the extent that the Fifth Circuit's decision actually was based on its interpretation of this Court's jurisprudence regarding RICO/antitrust pleading, that is only one more reason why certiorari should be granted. Among other things, that decision clearly conflicts with this Court's *Bridge* and *Hemi* opinions,[8] and errs by extending those opinions to the pleading of proximate cause in non-RICO contexts.

1. The Court Of Appeals' Opinion Conflicts With This Court's Holdings In *Bridge v. Phoenix Bond & Indem. Co.*

In evaluating Oceanic's pleading of proximate cause, the Fifth Circuit relied on circuit level authority predating and contradicted by the approach to such pleading this Court unanimously endorsed in *Bridge*. That omission only promoted the error that resulted.

In *Bridge*, this Court explained its jurisprudence regarding the pleading of RICO proximate cause as follows:

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[8] *Bridge v. Phoenix Bond & Indem Co*, 128 S. Ct. 2131 (2008); *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983 (2010).

> Proximate cause . . . is a flexible concept that does not lend itself to 'a black-letter rule that will dictate the result in every case.' . . . Instead, we "use[d] 'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts," . . . with a particular emphasis on the "demand for some direct relation between the injury asserted and the injurious conduct alleged," . . . ('When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries').[9]

As the *Bridge* Court further noted, this "central question" as to the relationship between a defendant's wrongful conduct and the plaintiff's injury must be carefully considered in each case, as proximate cause "is generally not amenable to bright-line rules."[10]

In *Bridge*, the Court made that considered inquiry, finding that the plaintiffs had adequately pleaded "proximate cause" by alleging that the wrongful conduct by one group of bidders for government contracts, intended in the first instance to induce government action for its own benefit, had directly and foreseeably injured its competitors for those contracts.

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9 128 S. Ct at 2142 (internal citations omitted).

10 *Id.* at 2145.

The *Bridge* lawsuit arose when rival bidders for county-owned tax liens discovered that the defendants had engaged in the wholesale submission of fraudulent bidder qualification affidavits to the county in order to gain an unfair share of the tax liens. In that context, the proximate cause allegations were simple: The plaintiffs "had suffered the loss of property relating to the liens they would have been able to acquire, and the profits flowing therefrom, had [the fraudulent bidder group] not implemented their scheme and acquired liens in excess of their appropriate share through their violation of the County Rule."[11]

The Seventh Circuit sustained the complaint, holding that the plaintiff had sufficiently alleged proximate cause "because they (along with other losing bidders) were 'immediately injured' by the fraudulent bidders' scheme."[12] This Court affirmed unanimously because:

> **the [plaintiffs'] alleged injury – the loss of valuable liens – is the direct result of [the defendants'] fraud. It was a foreseeable and natural consequence of [defendants'] scheme to obtain more liens for themselves that other bidders would obtain fewer liens.**[13]

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11 *Id.* at 2136 n.3 (quoting from the underlying complaint that was sustained in this Court).

12 *Id* at 2137 (citing the Seventh Circuit's opinion at 477 F.3d at 930-932)

13 *Id.* at 2145 (emphasis added).

The analogy to the Oceanic case is exact. Oceanic's alleged injury – the loss of the opportunity to obtain tremendously valuable oil and gas contracts – was the direct result of ConocoPhillips' bribery. It was also the foreseeable, natural and intended consequence of ConocoPhillips' scheme to obtain those concessions for itself that Oceanic – the only other competitor for those concessions[14]– could not obtain them.

Had the Court of Appeals considered the implications of *Bridge* for this case, it would have reached the same conclusion this Court reached in *Bridge* – and easily sustained Oceanic's Complaint. However, the Court of Appeals neither mentioned nor analyzed *Bridge*.[15]

2. The Court Of Appeals' Opinion Also Conflicts With This Court's Recent *Hemi* Decision.

In *Hemi*,[16] a plurality of this court dismissed the plaintiffs' civil RICO claims because those claims, on

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[14] The record confirms that only ConocoPhillips and Oceanic sought the subject oil and gas rights during the relevant period. The fact of this two-bidder universe is not contested, as Mr. Wachtell admitted in the sole hearing in this case. *See* DE 153 at 62-63 ("Of course, there were only two companies involved"). In fact, the record demonstrates that interest in the Timor Gap was *declining* during the relevant period, as company after company was *abandoning* their Timor Gap concessions. *See* DE No. 148-1.

[15] Very tellingly, the Response also fails to mention or analyze *Bridge*.

[16] 130 S. Ct. at 983

their face,[17] allegedly failed to plead proximate cause.[18] While there were significant divisions between the four Justices in the plurality and the remaining four Justices as to how the *Bridge* standards should be defined and applied in that case, Oceanic's pleadings clearly meet both the plurality's views (which stressed the directness of the injury) and the dissent's views (which stressed the forseeability of the *Hemi* plaintiffs' injuries).

Members of the *Hemi* plurality would surely appreciate that the causation issue here is as "straightforward" as that involved in *Bridge* and, as in *Bridge*, that this case involves a "zero-sum" game. If ConocoPhillips wrongfully obtained the subject production-sharing contracts, and thereby precluded

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[17] As ConocoPhillips recognizes, *see* Response at 7, *Hemi*'s analysis involved only the facial allegations of the complaint. *Unlike in this case*, there was no effort to pass judgment on the plausibility or implausibility of the complaint's factual allegations.

[18] The four justice plurality's view of proximate cause was not endorsed by Justice Ginsberg, who concurred in the judgment, but did so "without subscribing to the broader range of the Court's proximate cause analysis." *See* 130 S Ct. at 995. As the plurality view was even more squarely rejected by the three dissenters, and Judge Sotomayor had recused herself from the case, this Court had split (4 – 4) over the propriety of the plurality's analysis of the requirements for pleading proximate cause in the RICO/antitrust context. Though it seems clear that Oceanic's pleading of proximate cause in this case would satisfy either camp, certiorari could certainly be granted in this case to resolve that split, and thereby reach agreement on a clear standard endorsed by a full Court.

Oceanic from obtaining them, Oceanic was directly and predictably injured by that wrongful conduct.[19]

The *Hemi* dissenters, on the other hand, would clearly appreciate the fact that Oceanic's injury was intended, was foreseeable, and was precisely the type of injury that the RICO, antitrust, anti-bribery, and unfair competition laws were intended to prevent.[20]

3. The Court Of Appeals' Opinion Also Conflicts With The Law Of Pleading Applicable To the Pleading Of State Law Claims In The Federal Courts.

In its petition, Oceanic pointed to the impropriety of the Court of Appeals' support for the entry of a judgment on the pleadings regarding Oceanic's state common law claims.[21] As a result of that decision, Oceanic lost its access to both the federal *and the state courts*. That was so though Oceanic's state law claims had been properly pleaded under all of the applicable federal rules, and *none* of those rules required any special pleading of "proximate cause".

The Response never addresses these very problematic state law pleading issues. Instead, ConocoPhillips attempts to argues that this Court's RICO/antitrust jurisprudence requires the dismissal of common law claims not pleaded in the manner required

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19 *Hemi*, 130 S. Ct at 992.

20 *Id.* at 1000.

21 Petition at 28-31.

for RICO and anti-trust claims,[22] or that Oceanic has somehow waived its right to rely on the clearly applicable pleading rules.[23]

Neither of these approaches can disguise the fact that state law claims that did not even have to mention proximate cause were thrown out of court – *on the pleadings* – for failing to plead proximate cause. And that happened at the hands of courts believing themselves authorized, by *Twombly/Iqbal*, to decide the facts and, ultimately, the merits of this case, without regard for what was actually in the pleadings.

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[22] *See, e.g.*, Response at i (the ConocoPhillips "Question Presented," which urges that the dismissal of the common claims was "required" by the *AGC*, *Holmes*, *Anza*, and *Hemi* cases); *id* at 9 (repeating effort to lump the common law claims in with the RICO/antitrust claims, while ignoring the fact that they are subject to entirely different pleading regimes).

[23] *See* Fed. R. Civ. P. 8, 9, 12, 56, 84 and the Official Forms. Alternatively, ConocoPhillips tries to confuse the issue by claiming that Oceanic is arguing that these Federal Rules nullify this Court's RICO/antitrust pleading decisions, *see* Response at 12 n.6, when that is clearly not Oceanic's position. ConocoPhillips also argues that, because RICO/antitrust proximate cause pleading incorporates common law principles, common law claims must also be pled pursuant to the special rules for such federal statutory claims. *Id.* at 12-13.

B. THE COURT OF APPEALS IMPROPERLY INTERPRETED AND APPLIED *TWOMBLY/IQBAL* TO JUSTIFY A JUDGMENT ON THE PLEADINGS RENDERED ON THE BASIS OF PROFOUNDLY INCORRECT "FACTS," FROM UNKNOWN SOURCES FAR OUTSIDE THE PLEADINGS, AND IN CONTRAVENTION OF ALL OF THE APPLICABLE FEDERAL RULES.

The Petition's extensive discussion of the *Iqbal* and *Twombly* issues goes largely unaddressed by ConocoPhillips, and Oceanic will rely on its arguments therein. However, one point regarding ConocoPhillips' factual argument does need to be addressed: its incorrect premise that Oceanic's complaint stands or falls on the answer to a single question – whether Australia would have consented to an East Timorese termination of contracts with ConocoPhillips.[24] That very question, and the assumptions that underpin it, are counterfactual.

Oceanic's complaint demonstrates that in 1991, the "Joint Authority," a consortium of Indonesia and Australia created pursuant to the Timor Gap Treaty,[25] granted concessions to ConocoPhillips.[26] Notably, East Timor, as an independent nation, was not a party to the Timor Gap Treaty or to the 1991 grants. In fact, as

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24 *See* Response at 9-11.

25 *See* Pet. App. at 108a, ¶ 47, 122a, ¶ 84

26 *See id* at 117a-118a, ¶ 73.

East Timor's independence loomed, its leaders harshly criticized that treaty and ConocoPhillips, and made clear that, upon independence, East Timor would not succeed to that treaty.[27]

The issue never was whether *Australia* would have *consented* therefore to East Timor's *termination* of contracts bestowed during its Indonesian occupation, for the simple reason that Australia had no say whatsoever in deciding what, if any, treaties or contracts East Timor would terminate or confirm upon independence.

Instead, the real issue was always whether, but for the bribes, *East Timor*, upon independence, would have ratified and confirmed any Indonesian-era contracts. That issue, as framed by the facts in Oceanic's complaint, presents a starkly different proximate cause issue than the one addressed by ConocoPhillips and the courts below.

On that issue, the complaint alleges that the bribes affected the decision-making in East Timor as that country approached independence. While pre-bribe comments made by East Timor's decision-makers were hostile to the continuation of the treaty generally and to ConocoPhillips specifically,[28] their position after the bribes changed dramatically. While, as promised by the pre-independence leadership, East Timor's new constitution rescinded all prior contracts,[29] the bribes

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27 *Id.* at 122a, ¶¶ 84, 85.

28 *See id.*

29 *See id* at 123a-124a, ¶ 88.

caused East Timor to recognize and reinstate the contracts with ConocoPhillips, and to do so on terms even more favorable to ConocoPhillips.

Twombly and *Iqbal* had a profound effect on the disposition below because the Fifth Circuit based its dismissal on the implausibility of a scenario that could not arise in the context of the facts pleaded. Once one recognizes that East Timor, as an independent sovereign, was free to terminate or ratify any prior contract, the plausibility inquiry under *Twombly* and *Iqbal* changes dramatically, and the chain not causation invented by ConocoPhillips and adopted by the District Court crumbles.

For example, it is hardly speculative that East Timor could or would have abrogated prior concessions. The likelihood of such abrogation is consistent with the facts alleged relating to the pre-independence assessment of those agreements, and it is further confirmed by the terms of the Constitution cited in the complaint.

Similarly, whether Australia would have preferred to maintain the status quo is irrelevant because Australia had no power to cause autonomous East Timor to ratify Indonesian-era contracts without determining whether other contractors (like Oceanic) could do more for East Timor's sovereign interests.

This disturbingly off-track analysis is the logical outcome of any reading of *Twombly/Iqbal* that permits a court to wander so far from the pleadings - and so far from those rules of civil procedure and evidence that

provide integrity, discipline, fairness and quality control to the fact-finding process.

III. CONCLUSION.

This Court should grant the Oceanic petition for certiorari.

Respectfully submitted,

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